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<p>1 U.S. DISTRICT COURT</p> <p>2 FOR THE NORTHERN DISTRICT OF ILLINOIS</p> <p>3 EASTERN DIVISION</p> <p>4</p> <p>5 RHONDA TRACY : Case No. 99 C 2736</p> <p>6 Plaintiff :</p> <p>7 v. :</p> <p>8 JEWEL FOOD STORES, INC., : et al. :</p> <p>9 Defendants :</p> <p>10</p> <p>11</p> <p>12 Deposition of STEVEN W. MILLER, taken</p> <p>13 on Monday, September 11, 2000, commencing at</p> <p>14 10:09 a.m., at the offices of Taft Stettinius &</p> <p>15 Hollister LLP, 1800 Firststar Tower, 425 Walnut</p> <p>16 Street, Cincinnati, Ohio, before Susan M.</p> <p>17 Barhorst, Notary Public.</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23 AROUND-THE-CLOCK REPORTING SERVICES P. O. BOX 11008 CINCINNATI, OHIO 45211 (513) 481-5200</p> <p>24</p>	<p>1 MILLER DEPOSITION EXHIBITS MARKED/IDENTIFIED</p> <p>2 1 11</p> <p>3 8 19</p> <p>4 2* 35 3* 35 4* 35 5* 35</p> <p>6 6* 35 7 7* 35 8 8* 35 9 9 35 10 10 35</p> <p>11 11 35 12 12 70 13 13 79 14 14 79 15 15 79</p> <p>16 16 84 17 17 84 18 18 84</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23 *Exhibits 2-8 are CONFIDENTIAL - UNDER PROTECTIVE ORDER</p> <p>24 Examination:</p> <p>17</p> <p>18 By Mr. Manzo 4</p> <p>19</p> <p>20 by Mr. Cass 76</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>
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<p>1 APPEARANCES:</p> <p>2 On behalf of Plaintiff:</p> <p>3 Edward D. Manzo, Esq. Cook, Alex, McFarron, Manzo, 4 Cummings & Mehler 200 W. Adams, Suite 2850 5 Chicago, Illinois 60606</p> <p>6 On behalf of Defendants:</p> <p>7 Russell E. Cass, Esq. Sidley & Austin 8 Bank One Plaza 10 S. Dearborn 9 Chicago, Illinois 60603</p> <p>10 Kyle K. Kappes, Esq. Senior Patent Counsel 11 Kimberly-Clark 401 North Lake Street 12 P. O. Box 349 Neenah, Wisconsin 54957-0349</p> <p>13 Michael S. McCoy, Esq. Fulbright & Jaworski, L.L.P. 14 1301 McKinney, Suite 5100 15 Houston, Texas 77010-3095</p> <p>16 Craig R. Smith, Esq. Fish & Richardson P.C. 17 225 Franklin Street Boston, Massachusetts 02110-2804</p> <p>18 Also present:</p> <p>19 Patrick D. Lane, Esq. 20 Associate General Counsel Patent Litigation 21 The Procter & Gamble Company 537 E. Pete Rose Way, Suite 110 22 Cincinnati, Ohio 45202</p> <p>23</p> <p>24</p>	<p>1 THE VIDEOGRAPHER: This is the</p> <p>2 videotape deposition of Steven W. Miller in the</p> <p>3 case United States District Court for the</p> <p>4 Northern District of Illinois, Eastern Division,</p> <p>5 Rhonda Tracy versus Jewel Food Stores,</p> <p>6 Incorporated; American Stores Company; Wal-Mart</p> <p>7 Stores, Incorporated; Dominick's Finer Foods,</p> <p>8 Incorporated; Drypers Corporation; Kimberly-Clark</p> <p>9 Corporation and Tyco International Limited, Case</p> <p>10 Number 99 dash C dash 2736. Today is September</p> <p>11 11th, 2000. It is 10:09 a.m., and we are on the</p> <p>12 record. If the reporter will now swear the</p> <p>13 witness.</p> <p>14 THE REPORTER: Would you raise your</p> <p>15 right hand, please? Do you solemnly swear to</p> <p>16 tell the truth, the whole truth and nothing but</p> <p>17 the truth in the testimony you are about to give,</p> <p>18 so help you God?</p> <p>19 THE WITNESS: I do.</p> <p>20 EXAMINATION</p> <p>21 BY MR. MANZO:</p> <p>22 Q. Mr. Miller, my name is Edward Manzo</p> <p>23 and I represent the plaintiff in this action,</p> <p>24 Rhonda Tracy. Just a little correction. This is</p>

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1 the deposition of Procter and Gamble and I
2 understood that you are the designated witness;
3 is that correct?

4 A. That's correct.

5 Q. And Tyco is no longer a defendant,
6 but Confab Holdings has been substituted in its
7 place.

8 Now, will counsel all indicate their
9 appearances here today? I represent the
10 plaintiff. Are you represented by counsel, Mr.
11 Miller?

12 A. Yes, I am.

13 MR. LANE: Patrick Lane representing
14 the witness and representing Procter and Gamble.

15 MR. CASS: Russell Cass from Sidley
16 and Austin representing defendant
17 Kimberly-Clark.

18 MR. KAPPES: Kyle Kappes from
19 Kimberly-Clark.

20 MR. SMITH: Craig Smith of Fish and
21 Richardson representing defendant Kendall Confab
22 Holdings.

23 MR. MCCOY: Mike McCoy, Fulbright and
24 Jaworski representing Drypers Corporation.

1 because that's a staggering amount of money.
2 How long have you worked for Procter
3 and Gamble?

4 A. 16 years.

5 Q. So you joined them in 1984?

6 A. That's correct.

7 Q. What was your position at the time?

8 A. I was a patent attorney trainee.

9 Q. Do they have a training program at
10 P&G?

11 A. Yes.

12 Q. And were you fresh out of school or
13 something else at that time?

14 A. I was fresh out of law school.

15 Q. Where was that?

16 A. The Ohio State University.

17 Q. Okay. And when did you get your next
18 job title?

19 A. About a couple of months later in
20 November I was promoted to counsel dash patents.

21 Q. When did you get your registration
22 number from the PTO?

23 A. I believe it was in December of 1985.

24 Q. What's your registration number?

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1 MR. MANZO: Thank you, counsel.

2 BY MR. MANZO:

3 Q. Mr. Miller, are you a member of the
4 bar?

5 A. Yes.

6 Q. So you're familiar with depositions?

7 A. Yes.

8 Q. Have you given a deposition before?

9 A. Yes.

10 Q. Have you taken a deposition before?

11 A. No.

12 Q. What is your current position, Mr.
13 Miller?

14 A. I'm vice president and general
15 counsel - patents for the Procter and Gamble
16 Company, Procter and Gamble Worldwide.

17 Q. Procter and Gamble is a large
18 company, isn't it?

19 A. Yes.

20 Q. You have over a 100,000 employees?

21 A. Yes.

22 Q. And your approximate sales are?

23 A. 40 billion per year.

24 Q. That's wonderful. Congratulations,

1 A. 31984.

2 Q. Thank you. What were your job duties
3 in November 1984?

4 A. I was in the paper products division,
5 so I was responsible for the preparation and
6 prosecution of patent applications related to all
7 of our paper products, including diapers,
8 feminine napkins and we had a medical-surgical
9 gown business as well.

10 Q. What was your next job title?

11 A. We believe it was patent counsel.

12 Q. When was that?

13 A. That would have been right as I
14 passed the patent bar in 1985.

15 Q. Are you a member of the bar of the
16 State of Ohio?

17 A. Yes.

18 Q. Any other states?

19 A. No.

20 Q. What was your next job position?

21 A. I was promoted to senior patent
22 counsel in 1989, responsible again for the paper
23 products division.

24 Q. How many lawyers at that time served

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1 the paper products division in terms of patent
 2 lawyers, in round numbers?
 3 A. Around six to eight.
 4 Q. What was your next title after that?
 5 A. Associate general counsel dash
 6 patents.
 7 Q. And when was that?
 8 A. 1994.
 9 Q. And could you take us up to the
 10 present?
 11 A. In 1999, I was promoted to vice
 12 president and associate general counsel for the
 13 baby care global business unit. In July of this
 14 year, I was promoted to vice president and
 15 associate general counsel for the baby care and
 16 feminine care global business unit. And then in
 17 October 1st (sic) of this year, I was promoted to
 18 my current position.
 19 MR. LANE: August?
 20 THE WITNESS: August the 1st of this
 21 year.
 22 Q. Do you have a technical undergraduate
 23 degree?
 24 A. Yes.

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1 Q. What's that in?
 2 A. Mechanical engineering.
 3 Q. Did you do any mechanical engineering
 4 work before becoming a lawyer?
 5 A. I was a intern at a small company in
 6 Columbus, Ohio for a summer job, but that was the
 7 extent of my engineering experience.
 8 Q. Have you ever designed any diapers?
 9 A. Yes.
 10 Q. Have any of your designs gone into
 11 production?
 12 A. Yes.
 13 Q. How many?
 14 A. One.
 15 Q. Can you describe it for us generally?
 16 A. Yes. It was a training pant product
 17 that had a stretchable side seam on it and it was
 18 marketed under the Pampers and Luvs training
 19 pants.
 20 Q. When was that? Let me ask that more
 21 precisely. When did it go into production
 22 approximately?
 23 A. Somewhere in about 1994, '95.
 24 Q. And when did you do this design work?

1 A. Oh, about 1992 or '93.
 2 Q. Let me show you the subpoena which
 3 has been marked as Exhibit 1 and I invite your
 4 attention to Attachment A on the second sheet.
 5 Are you knowledgeable about any of
 6 the subjects on which testimony is requested?
 7 A. Yes.
 8 Q. Which of those are you knowledgeable
 9 on?
 10 A. I am knowledgeable about the first
 11 one, the statements made in the affidavit of
 12 Miguel Alemany; about the second one,
 13 communications between Procter and Gamble and any
 14 of the defendants. I'm generally familiar with
 15 the construction of disposable diapers made or
 16 sold in the United States. I generally
 17 understand the circumstances of the manufacturing
 18 and first commercial sale of the Luvs diaper in
 19 that exhibit that Mr. Alemany accepted. And I am
 20 somewhat familiar with the general manufacturing
 21 techniques for disposable diapers.
 22 Q. Good. What makes a diaper a
 23 disposable diaper?
 24 A. Typically one would look at its

1 ability to serve one use and then be thrown away
 2 by the mother or father who uses the product.
 3 Q. I understand that there are two
 4 brands at least of disposable diapers that are
 5 made or sold by P&G; is that correct?
 6 A. Yes.
 7 Q. One is well -- could you tell us what
 8 they are?
 9 A. One is Pampers and the other is Luvs,
 10 and I'm talking about the United States.
 11 Q. Let's confine it to the United
 12 States. Do you know when the Pampers line first
 13 came out?
 14 A. It was sometime in the sixties. We
 15 had a test market of what we would call V-folded
 16 shaped diaper, which was the original Pampers
 17 diaper.
 18 Q. Do you know when the Luvs brand came
 19 out?
 20 A. In the mid 1970s, probably around '75
 21 or '76.
 22 Q. When you came to Procter and Gamble
 23 and began working in the diaper field with them,
 24 did you interface with diaper designers?

1 A. Yes.

2 Q. Approximately how many diaper
3 designers did you interface with, say, typically
4 in 1985 or 1986?

5 A. It would depend on the project I was
6 working on. Sometimes it may be a single
7 inventor who was working on a particular
8 technology, sometimes we had teams of -- you
9 know, five to eight designers who may be working
10 on the same project that I would interface with.

11 Q. Does P&G have dozens of diaper
12 designers or can you give us some measure of the
13 number of diaper designers that P&G had at that
14 time?

15 A. 1984, '85?

16 Q. Yes, that's fine.

17 A. Probably in the numbers of 50 to 100
18 would be my best estimate of the diaper
19 designers.

20 Q. Do you have any information as to the
21 educational level of those designers typically?

22 A. Yes.

23 Q. What -- what was the range of
24 education and experience of those people?

1 A. We had people anywhere from who was
2 just out of high school type of background to a
3 Bachelor of Science degree in mechanical or
4 chemical engineering, to some people who even had
5 Ph.Ds. So it was a wide range. And I'd say
6 typically it was a person who had a Bachelor of
7 Science degree.

8 Q. Is the design of a diaper something
9 that involves a lot of experimentation or a lot
10 of research?

11 A. It can. It's a very technically
12 oriented product and it's manufactured on
13 high-speed lines. So it requires a lot of
14 technical expertise.

15 Q. I suppose you have manufacturing
16 experts, too, for the design of the manufacturing
17 technology; is that true?

18 A. Yes.

19 Q. Did you work on that technology also?

20 A. I did not.

21 Q. In your experience, has Procter and
22 Gamble ever brought to the market any designs
23 from outside designs, people who were not
24 employees of the company?

1 A. I know we've looked at using
2 technology from outside the company. I don't
3 recall any specific technologies that we brought
4 from the outside. Yeah, I do recall one
5 incident. Yes, I do. Excuse me. We had
6 purchased the technology from a Mr. Rhineheart
7 Saby concerning the use of stretchable materials
8 in diapers.

9 Q. In terms of the level of skill of the
10 designers who you mentioned in 1984, would it
11 have been any different in 1990?

12 A. I don't think so.

13 Q. Okay. In 1985, how many different
14 designs of diapers were being made by Procter and
15 Gamble?

16 A. Made in the sense of commercially or
17 in the laboratory?

18 Q. I mean commercially.

19 A. I believe in the United States, there
20 were two different kinds that were marketed
21 widely across the U.S. And then there might have
22 been some in various stages of test marketing.

23 Q. And what about outside the United
24 States?

1 A. There were many designs tailored to
2 the specific region. We would market a different
3 diaper, say, to Asia, Far East customer than we
4 would, say, to a Latin American customer or a
5 European customer.

6 Q. Was that -- out of curiosity, was
7 that due to market demands or cost considerations
8 or what?

9 A. Partially.

10 Q. How many different diapers --
11 disposable diapers is P&G marketing currently?

12 A. Well, if you include the variations,
13 we have a Pampers premium line, a regular Pampers
14 line. We have a Luvs lineup here. And this is
15 all the United States, again. And we have a
16 Swimmer and we have wipes, which I guess aren't
17 diapers, but if you want to include those, those
18 are under the Pampers and Luvs name.

19 Q. Now, when the -- strike that.

20 What numbering system or other form
21 of identification do you at Procter and Gamble
22 use to identify different models of diapers?

23 A. We would typically assign a code,
24 depending on the project. It could have varied

1 from a specific project name from R&D to once it
 2 went commercial, there was a -- typically a
 3 designated TLR on each diaper.
 4 Q. What's a typical designator?
 5 A. If you a look in the '84, '85 time
 6 frame, you'll see Luvs G was a specific
 7 designator of a diaper or Pampers VX would be a
 8 typical designation for Pampers in that time
 9 frame.
 10 Q. After Luvs G, would there be a Luvs H
 11 or what?
 12 A. No. It didn't always go sequentially
 13 and that was probably one of our downfalls.
 14 We -- we'd randomly pick the designator,
 15 depending on the project. So one often had to
 16 have a whole sheet of codes to know what was what
 17 sometimes.
 18 Q. Are you familiar with the codes?
 19 A. Fairly, yes.
 20 Q. What is the -- well, in the Exhibit 1
 21 you'll see attached to the back of it an
 22 affidavit of Mr. Miguel Alemany, I think is how
 23 you might pronounce it; is that --
 24 A. No, it's Miguel Alemany.

1 Q. Okay. Miguel Alemany. And in
 2 paragraph number one here refers to a Winton Hill
 3 Technical Center facility. What's that?
 4 A. We have a large campus in Cincinnati
 5 that has several buildings and it's dedicated to
 6 research and development of various products.
 7 Q. Is diapers one of them?
 8 A. It was at that time, yes.
 9 Q. And today is it?
 10 A. No.
 11 Q. Does it still exist?
 12 A. Yes.
 13 Q. Is it still part of Procter and
 14 Gamble?
 15 A. Yes.
 16 Q. Okay. Was Mr. Alemany authorized to
 17 sign this affidavit?
 18 A. I'm not sure what you mean by
 19 "authorized." He felt that he could attest to
 20 the facts that were in this affidavit.
 21 Q. I wanted to know if he had permission
 22 from Procter and Gamble to do that.
 23 A. As far as I know, I didn't know that
 24 he needed it, any advice, but he was authorized

1 as far as I was concerned.
 2 Q. Does Procter and Gamble regularly
 3 cooperate with any of the other defendants in
 4 defending lawsuits involving diapers or paper
 5 products?
 6 A. No.
 7 Q. And it's a fact that you've been
 8 adversaries with some of the companies
 9 represented here; is that right?
 10 A. Yes.
 11 Q. Mr. Miller, I'm going to hand you
 12 what was marked in this lawsuit as Defendant's
 13 Exhibit 8, and it's a diaper and it has Big Bird
 14 and Cookie Monster on the outside. And I invite
 15 you to inspect that diaper.
 16 A. All right.
 17 Q. Is it a Procter and Gamble product?
 18 A. Yes.
 19 Q. Can you identify it?
 20 A. Yes. It's a Luvs diaper. Appears to
 21 be of the type that I would have characterized
 22 commercially as a Luvs G type of product with a
 23 specific type of back sheet with, as you said,
 24 the Cookie Monster, Big Bird design on it. And

1 it has two leg elastics and what we called at the
 2 time the comfort waistband.
 3 Q. What characterized the comfort
 4 waistband?
 5 A. Well, if you look on -- at the top of
 6 both edges of these diapers, it has a stretchable
 7 piece that allows the diaper to expand and
 8 contract to better fit the wearers.
 9 Q. How does it -- sorry. How did P&G
 10 make it stretchable?
 11 A. There's a piece of heat-shrinkable
 12 elastomeric material that's put between the top
 13 sheet and the back sheet. Then, in the
 14 manufacturing process, has heat applied to it to
 15 make it contract. And then when it comes off, it
 16 then expands to contract to its original shape.
 17 MR. MANZO: Mr. Lane, of these two or
 18 three, which is the Luvs G?
 19 MR. LANE: The thicker of them would
 20 be G versus VG, two Gs, one VG. I believe.
 21 MR. MANZO: Is this a G?
 22 MR. LANE: May I? May I see the
 23 others, please?
 24 MR. MANZO: I assume I could ask the

1 witness, but --
 2 THE WITNESS: That's a VG.
 3 MR. LANE: VG.
 4 MR. MANZO: Could I see the G?
 5 There's two G.
 6 MR. LANE: There are two Gs.
 7 MR. MANZO: Okay. Thank you.
 8 MR. LANE: We had two. We had two.
 9 I brought two.
 10 MR. MANZO: Thank you.
 11 BY MR. MANZO:
 12 Q. And, Mr. Miller, you agree that this
 13 is a G; is that right?
 14 A. Yes.
 15 Q. So the elastomeric material is what
 16 allows you to stretch the waistband laterally; is
 17 that correct?
 18 A. That's correct.
 19 Q. And then I suppose you might say that
 20 when this is put on a baby, it could stretch
 21 around the waist of the baby?
 22 A. Yes.
 23 Q. Now, this Exhibit 8 has had part of
 24 the waistband opened up and I wonder if you could

1 help me out with some terminology. So I'm going
 2 to come up here and let me start with the back.
 3 What do you call the part that has
 4 Big Bird on it?
 5 A. The back sheet.
 6 Q. And what's it made of?
 7 A. Typically in this design, it would be
 8 film, either polypropylene or polyethylene film.
 9 I'm not sure which one exactly, but we could
 10 probably find out.
 11 Q. Why is that there? And I don't mean
 12 Big Bird, I mean the film.
 13 A. To keep liquids contained within the
 14 product.
 15 Q. And do you have any idea how thick
 16 this is?
 17 A. It's several mils or maybe only one
 18 mil thick.
 19 Q. Okay. A mil is a thousandth of an
 20 inch; is that correct?
 21 A. That's correct.
 22 Q. Okay. Now, if I put the back sheet
 23 down and I look at the part that touches the
 24 baby, there seems to be a layer, I'll call it.

1 Do you see what I'm referring to in this
 2 exhibit? It -- it is white and it seems to have
 3 a pattern in it. Can you tell me what you call
 4 this?
 5 A. Yes.
 6 Q. What is that?
 7 A. The top sheet.
 8 Q. Okay. And what's the top sheet made
 9 of in this diaper?
 10 A. In this diaper, it's a nonwoven film
 11 or nonwoven web -- excuse me. -- of some kind of
 12 synthetic fibers.
 13 Q. Okay. Why is this here in the
 14 product?
 15 A. It's for softness against the skin of
 16 the baby and to keep the core from touching the
 17 skin. And then it allows urine to rapidly pass
 18 through it to get into the product.
 19 Q. Okay. Does P&G make this top sheet
 20 itself?
 21 A. No.
 22 Q. Is -- is it purchased?
 23 A. Yes.
 24 Q. And what do you call these things

1 that are marked refastenable?
 2 A. Those are the adhesive tape tabs.
 3 Q. And why are they here?
 4 A. They're to hold the product on to the
 5 baby.
 6 Q. So are they affixed to the back
 7 sheet?
 8 A. Yes.
 9 Q. And then the user would -- I think
 10 most people know how to use a disposable diaper,
 11 but in case you don't, why don't you describe it?
 12 A. Well, you unhook the tab portion from
 13 the release liner, put the front waist around the
 14 baby and then secure the tab to the front of the
 15 diaper so that the diaper would fit the baby.
 16 Q. And this has some kind of adhesive,
 17 does it?
 18 A. Yes.
 19 Q. Do you make the adhesive?
 20 A. No.
 21 Q. You purchase it?
 22 A. Yes.
 23 Q. Okay. Now, you referred to a core,
 24 C-O-R-E, I think?

1 A. Yes.
 2 Q. What do you mean by the core?
 3 A. In this case, it would be a batt of
 4 cellulose wood pulp fibers.
 5 Q. What does that do?
 6 A. That retains the urine within it, so
 7 that it's not moving around within the plastic.
 8 Q. What contains the exudate?
 9 A. That's an interesting word. The core
 10 typically contains the exudate.
 11 Q. Okay. And about how thick would you
 12 say this core is?
 13 A. It's probably an inch or so at
 14 least. We can measure it.
 15 Q. It's on the order of three-quarter of
 16 an inch to an inch?
 17 A. That's about right.
 18 Q. Okay. How do you get the wood pulp
 19 fibers to be white?
 20 A. They're typically bleached.
 21 Q. I see. Do you produce that product,
 22 too?
 23 A. No.
 24 Q. You purchase it?

1 A. Yes.
 2 Q. Do you manufacture any of the parts
 3 of this Exhibit 8?
 4 A. Other than the whole product --
 5 Q. Other than --
 6 A. -- no.
 7 Q. Okay. Now, I notice that there's
 8 a -- what I'll call a strip. And it's up here at
 9 the waistband. What would you call it?
 10 A. I'd call it a strip of elastomeric
 11 material.
 12 Q. All right. So just so that we're
 13 talking about the same thing, just so it's clear
 14 on the record, we're talking about a strip of
 15 something that's about an inch wide and it is
 16 laterally oriented and it is between what you
 17 call the back sheet and I think the top sheet; is
 18 that correct?
 19 A. That's correct.
 20 Q. So is it fair to say that the top
 21 sheet comes all the way up to the edge, the top
 22 edge of the diaper?
 23 A. Yes.
 24 Q. And is it fair to say that the only

1 thing between the top sheet and the back sheet is
 2 this strip we're talking about now?
 3 A. That's my -- there could be some
 4 glue --
 5 Q. Okay.
 6 A. -- but that's my understanding, if
 7 you want to exclude the glue. But it's either
 8 glued or heat sealed there or both.
 9 Q. I was going to ask you that soon
 10 enough. Okay. So why is this strip here?
 11 A. It provides the elastic contraction
 12 to allow the waist to expand and contract.
 13 Q. Can you tell us what it's made of?
 14 A. Generally, it's a heat-shrinkable
 15 film.
 16 Q. Do you heat shrink it?
 17 A. Yes.
 18 Q. When do you heat shrink it?
 19 A. During the manufacturing process.
 20 Q. How is the elastomeric film attached
 21 to this diaper?
 22 A. Your question was when?
 23 Q. How?
 24 A. How? It's put in in a flat

1 uncontracted state. So, in other words, it comes
 2 in as a roll, as an uncontracted piece and then
 3 is attached to the back sheet and the top sheet.
 4 Q. By what means is it attached?
 5 A. Typically you can see on here there
 6 are -- are bonds that are kind of a heat seal
 7 ultrasonic type of bond. And there may be some
 8 adhesive -- I haven't checked on this one to make
 9 sure -- that holds it there.
 10 Q. As I look at the top edge of the
 11 diaper on the outside, it feels corrugated. Why
 12 is that?
 13 A. It's due to the contraction of the
 14 elastic that then buckles the film and the top
 15 sheet to give you that kind of effect because
 16 you're taking something that's this wide and then
 17 shrinking it to something that's less wide.
 18 Q. And is it fair to say that the -- the
 19 back sheet doesn't shrink?
 20 A. That's correct.
 21 Q. Are there any other parts of this
 22 diaper we haven't spoken of?
 23 A. Probably the leg elastic.
 24 Q. Could you tell us something about

1 those, please?

2 A. At that time, they were typically
3 rubber threads that were put in in a stretched
4 condition and then allowed to retract during the
5 manufacturing process.

6 Q. And what was the purpose of that?

7 A. Again, to fit around the leg of the
8 wearer and to help contain any urine that wasn't
9 immediately captured by the absorbent core.

10 Q. Is this elastomeric strip on both
11 sections of the -- let me ask you something.
12 Strike that question.

13 Here's one part of the diaper on what
14 I might call the top and down at the opposing
15 end, there's another part. And when you put them
16 together, they gird the baby?

17 A. Mm-hmm, yes.

18 Q. Do you have a word that describes
19 this? Do you call it top and bottom or some
20 other word?

21 A. In this diaper, we'd call it the --
22 the front waistband and this is the back
23 waistband.

24 Q. Okay. Is the elastomeric strip on

1 A. Depends on what you mean by

2 "padding." I'm not sure. I mean, the intent is
3 always to keep a -- the skin of the baby not
4 subject to any harsh forces or harsh material.
5 So you'd always want to keep the entire surface
6 that's in contact with the baby soft and -- and
7 supple for the skin so it's not hurting it. So
8 if -- you may want to define what you mean by
9 "padding." That may help.

10 Q. Well, if I use the word "cushion,"
11 would that facilitate your understanding of the
12 question?

13 A. Not a whole lot, but I could say that
14 the top sheet certainly would provide that and
15 you wouldn't want the elastomeric film to be
16 directly against the skin. So that top sheet is
17 providing a cushion function against the skin.

18 Q. And what -- why would you not want
19 the elastomeric film to touch the skin?

20 A. It's a -- a plastic and if you've
21 ever put plastic directly against skin, it's hot,
22 and just found usually to be adverse to the
23 environment the baby is in, it could cause red
24 marking or skin irritation if you put plastic

1 both the front and the back waistband?

2 A. You mean, the same -- there's an
3 elastomeric strip in both.

4 Q. That's what I mean, there is.

5 A. Yes.

6 Q. Okay. What are the absorbent parts
7 of this diaper?

8 A. In that particular one, it's the
9 absorbent core. You may get small amounts of
10 absorbency out of the top sheet, but it's highly
11 unlikely that you'd get much.

12 Q. Anything else?

13 A. No.

14 Q. Does this elastomeric strip touch the
15 baby's skin?

16 A. No.

17 Q. Does -- I should broaden that
18 question to ask, does either elastomeric strip
19 touch the baby's skin?

20 A. No.

21 Q. Are there any parts included in this
22 diaper, Exhibit 8, that were put there by Procter
23 and Gamble with the intent of providing padding
24 in the waistband?

1 directly against the skin.

2 Q. Now, as I -- in this particular
3 Exhibit 8, part of the waistband has been opened
4 up and a little bit of the elastomeric strip has
5 been pulled away. Do you see that?

6 A. Yes.

7 Q. And looking at it, at the elastomeric
8 film, it appears to have been perforated at
9 intervals between an eighth of an inch and a
10 quarter of an inch apart in vertical lines, and
11 each perforation looks like it's about on the
12 order of a sixteenth of an inch or so, or a
13 millimeter, in this neighborhood. What are those
14 holes or perforations?

15 A. Well, the holes are -- were formed
16 probably when you -- whoever did this ripped it
17 apart. It's typically one continuous film. When
18 it's put on, it's then -- if you look at the rest
19 of it, there are those same types of marks on the
20 outside where it's heat sealed together to allow
21 all of these materials, all three of these layers
22 here to be joined together.

23 So my assumption was that was such a
24 strong bond that when whoever picked this apart,

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1 ripped it and there's probably some film maybe
2 remaining on -- on the back sheet when he -- they
3 ripped it. Or the process could be burning holes
4 through your film because it's creating extra
5 heat. It could be either one.

6 Q. Thank you. Can you identify when
7 this Exhibit 8 was produced?

8 A. Not the exact date, but it was in
9 1986.

10 Q. How do you know that?

11 A. Because the -- the Sesame Street back
12 sheet was a specific addition to the Luvs G
13 product. And as we look at the archival records
14 that we have and people's knowledge, it was in
15 1986 that this back sheet was added to the Luvs G
16 product.

17 Q. Well, how do you know this one is not
18 from 1987?

19 A. Because we switched to Luvs VG. I
20 believe late in 1986, which did not have the
21 Sesame Street back sheet.

22 Q. Are you saying that a Luvs diaper
23 that has the Sesame Street images only could come
24 from 1986?

1 Exhibit 2 -- that is to say Procter and Gamble
2 Exhibit 2 through Procter and Gamble Exhibit 11.
3 Do you see those?

4 A. Yes.

5 Q. Can you identify those documents?

6 And if there are any of these which are
7 confidential, maybe counsel for Procter and
8 Gamble will identify those.

9 A. The first one, Exhibit 2, is a
10 formula card of February 29th, 1984 related to
11 Luvs G. Exhibit 3 is a formula card of March
12 19th, 1984 for Luvs G. Exhibit 4 is a formula
13 card dated November 12th, 1985 for Luvs Gs with
14 glue spray. Exhibit 5 is a formula card dated
15 January 6, 1986 for Luvs VG. Exhibit 6 is a
16 formula card dated January 28th, 1986 for Luvs
17 G. Exhibit 7 is a formula card dated September
18 29, 1986 for Luvs VG. Exhibit 8 is a formula
19 card dated December 2nd, 1986 for Luvs G.

20 MR. LANE: Procter and Gamble
21 Exhibits 2 through 8 inclusive should be placed
22 under the protective order.

23 A. Exhibit 9 is a chronology of products
24 in the diaper category sold by Procter and

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1 A. Yes.

2 Q. Are you sure this is authentic?

3 A. As authentic -- I can verify that, to
4 me, it's a Procter and Gamble product. It
5 appears to be all the same materials. Obviously
6 we didn't purchase it, but I think we can fairly
7 certainly say that this is a Procter and Gamble
8 product.

9 Q. Okay. Now, do you have some
10 documentation that can verify the dates of
11 manufacture?

12 A. Sure. I believe we've produced them
13 to you.

14 MR. MANZO: Let's go off the record a
15 moment. I just want to make sure formula
16 cards --

17 THE VIDEOGRAPHER: We are off the
18 record at 10:53.

19 (Off the record.)

20 THE VIDEOGRAPHER: We are on the
21 record at 11:03.

22 BY MR. MANZO:

23 Q. Mr. Miller, I've placed before you
24 what has been marked by the court reporter as

1 Gamble. Exhibit 10 is a Luvs history concerning
2 sales of Luvs diapers. And Exhibit 11 is a
3 memorandum of August 20, 1990 concerning
4 historical data.

5 Q. Now, you've identified Exhibits 2
6 through 8 as formula cards, right?

7 A. Yes.

8 Q. What's a formula card?

9 A. It's a specification of exactly what
10 materials and their codes would go into a
11 specific product. And these would be used not
12 only by our diaper designers, but our
13 manufacturers' people to know exactly what
14 materials go into each product.

15 Q. Okay. Let's look at Exhibit 2. Now,
16 on the top left corner of this two by two table,
17 the first block is called supersedes number, and
18 next to it -- it has next to it, it has the word
19 "New" written in?

20 A. That this would have been the first
21 time this particular product had a formula card.

22 Q. Okay. Now, does the number of -- I
23 guess each formula card has a number; is that
24 right?

1 A. Yes.
 2 Q. And is that the top right block?
 3 A. Yes.
 4 Q. So, what's the card number for
 5 Exhibit 2?
 6 A. The card number is 915 dash N.
 7 Q. Does that decode any particular way?
 8 A. No, other than it allows us to look
 9 up historically those numbers. They're matched
 10 with the products with these top blocks, so
 11 someone can historically go back and pick up
 12 these formula cards.
 13 Q. Okay. Now, there's an expiration
 14 date. Do you see that?
 15 A. I see "Effective Date."
 16 Q. Oh, okay. Yes, I do. It's toward
 17 the top above the word "Composition." Are these
 18 formula cards created with an expiration date?
 19 A. Yes, they are.
 20 Q. Why?
 21 A. Sometimes materials or regulatory
 22 clearances will change and we want to make sure
 23 that they're updated so that they have a limited
 24 life. Now, a lot of times we'll go on with the

1 Q. And there are two approvals. Do you
 2 recognize any of those signatures?
 3 A. Yes. The bottom one, R.M. Glover, I
 4 recognize.
 5 Q. And who is him or -- or her?
 6 A. He would have been the vice president
 7 of manufacturing. Top one appears to be
 8 something in -- and it's an "M" and I'm pretty
 9 sure it would have been our director of R&D at
 10 the time and I'm trying to think of his name. I
 11 think it was Morris, but I'm not positive.
 12 Q. Now, between the table on the top and
 13 this, the signature at the bottom, there is -- is
 14 a listing in columns and the columns are called
 15 components. Then the next one is codes. Then
 16 you have quantity slash unit. Then you have web
 17 width, W-I-D-T-H. Then you have weight,
 18 W-E-I-G-H-T, units, then it looks like comma and
 19 then there's another symbol. To me, it looks
 20 like an "R."
 21 A. Should be a "G," I believe, in grams.
 22 Q. In grams, okay. Now, tell us how to
 23 read this --
 24 A. Okay.

1 same formula card, even though it may have
 2 expired. So one is originally set for our
 3 documentation.
 4 Q. Who makes this formula card?
 5 A. It's a combination of our R&D staff
 6 and our professional and regulatory staff with
 7 what exact products are, as well as people in the
 8 our supply groups.
 9 Q. Are disposable diapers subject to
 10 some sort of federal or state regulation?
 11 A. It depends. Some are today. None
 12 were back then.
 13 Q. So back in 1984 when this was
 14 created, would it have been at the hands of the
 15 regulatory staff in part?
 16 A. In part. It -- it was more, I think,
 17 the R&D and the manufacturing staff. But
 18 certainly the regulatory people had to know what
 19 materials and what codes were for clearance
 20 purposes.
 21 Q. Okay. Now, down at the bottom, there
 22 is a horizontal band with numbers one up through
 23 50. What's that?
 24 A. I have no idea.

1 Q. -- document, please.
 2 A. If you look down under component, it
 3 lists every component that's in the particular
 4 diaper. And it's by kind of a generic class that
 5 we would have called it. So, for instance,
 6 plastic sheet is likely the back sheet. That,
 7 then, has a code number associated with it that
 8 tells us what particular material is specified
 9 for that plastic sheet. And each material that
 10 we receive from a supplier was given a code
 11 number.
 12 The quantity and unit would be how
 13 many -- how much of that material was used in the
 14 product. So, for instance, 144.3 square inches
 15 of this plastic material was used on a
 16 small-sized diaper.
 17 The web width in inches would be the
 18 width of the web of that plastic sheet that came
 19 into the manufacturing line in inches. So it --
 20 it would be 10 and an eighth inches wide. And
 21 then the weight in units would be how much that
 22 material would weigh in grams for the product.
 23 Q. Now, under the heading of "Plastic
 24 Sheet," there are three entries, "Small,"

1 "Medium" and "Large." Is that how you gauged
2 your diapers at the time?

3 A. Yeah. Those were the sizes, three
4 sizes that we sold in the marketplace.

5 Q. Okay. Now, the next one is
6 "Fabric." What's that one?

7 A. That's likely the top sheet. That
8 would be the nonwoven fabric.

9 Q. Okay. And what's the third one,
10 "Soft Wet Strength Tissue"?

11 A. This would have been a tissue layer
12 that we would have usually encapsulated the
13 cellulose fibers with.

14 Q. Is that visible on this diaper of
15 Exhibit 8?

16 A. It's not visible. If you tore it
17 apart and looked at the core of Exhibit 8, you
18 would see tissue someplace.

19 Q. As you look inside --

20 A. Yeah. I see one here. There's a wet
21 strength tissue between the top sheet and the top
22 of the core.

23 Q. Okay. So that would be between the
24 top sheet and the core?

1 inches wide in its unshrunk state?

2 A. I believe that's right.

3 Q. Now, what's the next item?

4 A. Elastic. Those would have been the
5 leg elastics that we talked about on each side.

6 Q. Each side on Exhibit 8 has two
7 stripes or --

8 A. Strands.

9 Q. -- strands, should we say, of this
10 elastic?

11 A. Yes.

12 Q. Now, the next word is what?

13 A. Adhesive.

14 Q. Okay. Can you shed some light on
15 that, please?

16 A. There's an adhesive and it talks
17 about two types of adhesives, fabric to poly. So
18 that would have been the type of construction
19 adhesive that we would use to put on the back
20 sheet to secure the top sheet to it or the core
21 to it. So that was one adhesive.

22 The second is elastic to poly, and
23 that would typically be these leg elastics or
24 what adhesive was used to adhere them to the back

1 A. Yes.

2 Q. Next is something called what?

3 A. Dry lap.

4 Q. What's "lap"?

5 A. That's the cellulose fibers that make
6 up the core.

7 Q. And there's no quantity numbers
8 there. Why is that?

9 A. It's hard to measure the exact
10 quantities because they are air-laid onto a
11 moving belt, so you wouldn't just cut off a piece
12 of this. You would have to cut -- chop up the
13 fibers and then make it into this loose-fitting
14 core that you see in the product.

15 Q. All right. Next you've got
16 "Elastomeric Film." What's that?

17 A. That's the film in the waistband that
18 we talked about earlier, the head shrinkage
19 elastomeric film.

20 Q. And for the small size, it says
21 there's a web width of seven inches; is that
22 right?

23 A. Yes.

24 Q. So does that mean that it's seven

1 sheet.

2 Q. Okay. Now, there is a perfume
3 emulsion dash composition and then there's a
4 perfume dash usage. What does that refer to?

5 A. I think "Composition" referred to
6 what particular materials we were using
7 together. There was a perfume and a emulsifier
8 in the water. And then the actual usage was how
9 much did you put into the diaper, and that's why
10 that -- there's only a column in the weight on
11 the right.

12 Q. What's the emulsifier do?

13 A. I have no idea.

14 Q. Is emulsifier something you typically
15 associate with soap?

16 A. No, I don't think so.

17 Q. Okay. Now, the next item is "Tapes,"
18 and there are two kinds, "Release" and
19 "Fastening." Could you tell us what those are?

20 A. Yeah. These are the tapes you had
21 mentioned earlier. There's a couple of
22 components. As I said, this release tape which
23 has a different coating than this overall back
24 piece of tape.

1 So there's actually two pieces that
2 form this construction, the release tape being
3 put on the top sheet and the fastening tape being
4 put on to the back sheet. And that then forms
5 one unit and we've got a wide bond we call it,
6 that you can see the -- where the bond is to the
7 release tape to the tab.

8 Q. And this is for closure of the
9 diaper?

10 A. Yes.

11 Q. And then the next row says, "Total
12 Material Usage," and tell us how to read this
13 next group, would you please?

14 A. Well, it's in a weight per unit in
15 grams. So if you look at it, and my
16 understanding was this is -- if you weighed the
17 final product, this would be the weight per
18 diaper in grams. So a small would be 41.10, it
19 appears to be, grams.

20 Q. And then down at the next row, you
21 have the "Finished Product Weight." That's after
22 some things were removed?

23 A. Right. There's typically trim of the
24 poly and the top sheet, and as you create a

1 A. Yes.

2 Q. Now, down here at the bottom left it
3 has, "Distribution of Copies"?

4 A. Yes.

5 Q. Can you decode any of that for us?

6 A. Those would have been the people that
7 needed to see this document, and the number after
8 them would be four. I know R&D is certainly
9 research and development and they got four
10 copies. FMJ would have been Fred Joffe, who
11 would have been one of the diaper directors at
12 the time and he got two. And then none of the
13 others ones look familiar to me at this point.

14 Q. You don't know what "CG 4" stands
15 for?

16 A. No.

17 Q. Any of these go to legal?

18 A. I don't believe they did, no.

19 Q. Would it be your understanding that
20 apart from R&D, these other initials are people's
21 names?

22 A. The top line may be specific groups,
23 like product manufacturing or someone in the
24 plants. The second line looks more like initials

1 finished product, you would subtract that off and
2 get a final product weight.

3 Q. Okay. Now, what is the relationship
4 between the effective date of this formula card
5 and the production of anything?

6 A. Typically the formula cards were put
7 into effect right when we would start the
8 manufacturing processes for these lines. So we
9 knew we had to have this in place by February
10 29th of 1984 in order for our manufacturing lines
11 to run this particular specification. So that
12 would be the start-up date for this run of Luvs
13 G.

14 Q. Where or were Luvs G diapers made?

15 A. We have four plants. I can't -- I
16 don't want to speculate, but it would have been
17 in one or all four of those plants.

18 Q. What states are they in?

19 A. There's one in Mehoopany,
20 Pennsylvania; one in Cape Girardeau, Missouri;
21 one in Albany, Georgia; and one in Modesto,
22 California.

23 Q. Are those plants owned or operated by
24 P&G?

1 of people because we would use typically three
2 initials for that. And then I'm not sure what
3 the bottom line would be.

4 Q. Of the three, you mean?

5 A. Yeah. Well, I don't know what that
6 line represents because it looks like there's a
7 "P&L" it looks like, instead of an initial.

8 Q. I can't read it either. Below that
9 there's a parenthetical, "LU" surrounded by
10 parenthesis. Do you know what that means?

11 A. No, I don't.

12 THE VIDEOGRAPHER: We are off the
13 record at 11:24.

14 (Off the record.)

15 THE VIDEOGRAPHER: We're on the
16 record at 11:26.

17 MR. CASS: I'm sorry. Before we go
18 any further, can we stipulate that Exhibits 2
19 through -- what's the last one? -- 11 are
20 business records that fall within the hearsay
21 exception to the Federal Rules?

22 MR. MANZO: Well, I don't know
23 anything yet about nine through 11, but I think I
24 can stipulate on two through eight at this time.

1 MR. CASS: Okay. We can revisit
 2 those later.
 3 BY MR. MANZO:
 4 Q. Let me just ask a few follow-up
 5 questions on that. Mr. Miller, do these appear
 6 to be true and authentic copies of business
 7 records of Procter and Gamble?
 8 A. Yes.
 9 Q. Did you ever see any of those formula
 10 cards back in the 1980s?
 11 A. Yes, I would have. Not necessarily
 12 these, but I did see formula cards.
 13 Q. Okay. Now, the next -- Exhibit 3 is
 14 much the same as Exhibit 2; is that right?
 15 A. Much the same, yes.
 16 Q. But Exhibit 4 has an additional
 17 category on the adhesives and looks like there's
 18 now "Tissue-to-Core" and "Fabric-to-Tissue"
 19 entries. Do you see that?
 20 A. Yes.
 21 Q. And the product that is represented
 22 by Exhibit 4 is what?
 23 A. Luvs G with glue spray.
 24 Q. What is -- glue spray doesn't sound

1 specification is listed as supersorber.
 2 Q. That was going to be my next
 3 question. What is supersorber? Is that a trade
 4 name?
 5 A. No, it's not. It's a generic name
 6 that refers to polyacrylate types of particles
 7 that absorb several times their own weight in
 8 urine or water.
 9 Q. Was that something developed at P&G?
 10 A. What, the super --
 11 Q. The polysorbers.
 12 A. Those weren't. Specific particles
 13 were not, no.
 14 Q. Is the addition of the glue spray and
 15 the supersorber the kind of things that your
 16 diaper designers worked on?
 17 A. Yes.
 18 Q. And you called it polyacrylate; is
 19 that correct?
 20 A. Yes.
 21 MR. MANZO: Yeah, I'll stipulate as
 22 to Exhibit 2 through 8 that they're business
 23 records of P&G.
 24 BY MR. MANZO:

1 like something you'd put in a diaper. Tell us
 2 about that.
 3 A. It's actually a patented technology
 4 that we were able to come up with of spraying
 5 droplets of glue onto the tissue that was by the
 6 core, as we talked about, so that the adhesive
 7 didn't block the acquisition of urine, but we'd
 8 go in and find droplets. So what we added were
 9 these two categories of specific adhesives to do
 10 that.
 11 Q. Okay. There's no adhesive design to
 12 make the diaper adhere to the baby?
 13 A. That's not what -- were not what
 14 these are referring to.
 15 Q. Okay. All right. Now, Exhibit 5 is
 16 for a different product; is that correct?
 17 A. That's correct.
 18 Q. What's that product?
 19 A. That is Luvs VG.
 20 Q. And now what's a Luvs VG?
 21 A. The difference between VG and G is
 22 basically that you have a much thinner core due
 23 to the addition of what we call absorbent gelling
 24 material or AGM particles, which in this specific

1 Q. Can you identify Exhibit 9? I think
 2 you said earlier that it's a history. I know you
 3 said it was a chronology; is that right?
 4 A. Yes.
 5 Q. Did you prepare this exhibit?
 6 A. No, I did not.
 7 Q. Do you know who did?
 8 A. I -- I don't know the exact person
 9 who did. It was prepared probably about eight,
 10 nine years ago by someone in R&D trying to lay
 11 out our commercial sales of products.
 12 Q. And the first entry precedes -- or
 13 does it or does it not precede your joining the
 14 company?
 15 A. No. The first one precedes it.
 16 Q. And you joined later that year?
 17 A. Right.
 18 Q. In what month, do you recall?
 19 A. August of '84.
 20 Q. And do you remember what Luvs D was?
 21 A. Yeah. It was a -- it was a
 22 hourglass-shaped product similar to this. It
 23 only had one strand of elastic and did not have a
 24 waistband, didn't have the waist feature, the

1 comfort waistband that Luvs G had.
 2 Q. It had only one G strand?
 3 A. It only had one leg strand.
 4 Q. Okay. One leg strand, okay. And the
 5 reason I asked you about Luvs D, is Luvs, the
 6 first line next to January 1984, talks about
 7 sales of Luvs D?
 8 A. Right.
 9 Q. And you have a separate test market
 10 city that's called Cleaveland,
 11 C-L-E-A-V-E-L-A-N-D (sic)?
 12 A. That was a misspelling. Should be
 13 Cleveland, Ohio.
 14 Q. I know at least a lot of cities in
 15 the United States --
 16 A. I believe it was Cleveland, Ohio,
 17 it's my understanding, but --
 18 Q. There was reference here in November
 19 1984 to hourglass shape. And let me ask you, is
 20 Exhibit 8 something which has an hourglass shape?
 21 A. Yes.
 22 Q. Are there disposable diapers that
 23 don't have hourglass shapes --
 24 A. Yes.

1 A. In the sixties.
 2 Q. Yes. 1960?
 3 A. Yes, sorry.
 4 Q. And down here in late 1986 there's a
 5 reference to "Ultra Pampers." What
 6 differentiates an Ultra Pamper from a non-Ultra
 7 Pampers?
 8 A. The Ultra Pampers in this period
 9 included the superabsorbent or AGM material to
 10 make it thinner.
 11 Q. Was this Exhibit 9 prepared for
 12 litigation purposes, do you know?
 13 A. No, I don't believe it was.
 14 Q. Was this prepared in the normal
 15 course of business practice for Procter and
 16 Gamble?
 17 A. Yes.
 18 Q. And was it prepared by somebody who
 19 works for Procter and Gamble --
 20 A. Yes.
 21 Q. -- who had knowledge of the facts?
 22 A. Yes.
 23 Q. Do you see any errors other than the
 24 spelling, the potential spelling mistake on this

1 Q. -- that are sold by P&G?
 2 A. Now or at the time?
 3 Q. Ever.
 4 A. Oh, yes, certainly.
 5 Q. What shapes would those be?
 6 A. They were rectangular. Those were
 7 the early Luvs or Pampers -- excuse me -- brand
 8 that I talked about earlier that were V-folded
 9 or --
 10 Q. Now, your company goes back to the
 11 1800s, as I understand it?
 12 A. Yes.
 13 Q. Founded in 1837 by William Procter
 14 and James Gamble; is that right?
 15 A. Yes.
 16 Q. And it was incorporated in 1905,
 17 right?
 18 A. I'll accept that.
 19 Q. Okay. It's information that I have
 20 from a form 10K by the Procter and Gamble Company
 21 for the year ended June 30, 1999.
 22 Just generally, do you know when
 23 disposable diapers were first produced or sold by
 24 the --

1 Exhibit 9?
 2 A. I don't know of any other errors.
 3 Q. You identified Exhibit 10 earlier as
 4 a Luvs history, I think?
 5 A. Yes.
 6 Q. Did you prepare this exhibit?
 7 A. No.
 8 Q. Do you know who prepared it?
 9 A. I do not.
 10 Q. How do you know that it's a Luvs
 11 history?
 12 A. Well, the title is Luvs history 1976
 13 to '87 old diapers, so -- and I read this
 14 document and it appears to be a history of Luvs
 15 in the seventies and eighties.
 16 Q. Okay. Just looking at the -- the
 17 Luvs diapers, it appears that what was done is
 18 that you had a test market, right? Then there
 19 was a beginning of a national expansion, then you
 20 introduced a certain kind of packaging in a test
 21 market, then you had national expansion of
 22 something; is that about right?
 23 A. Yes.
 24 Q. And I assume you have a number of

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1 test markets around the United States, right?

2 A. Yes.

3 Q. And then once you're satisfied, you
4 begin a national roll out?

5 A. Yes.

6 Q. So is that what "national expansion"
7 means, is the national roll out?

8 A. Yes.

9 Q. And "Medium 48 Convenience Pack"
10 refers to what?

11 A. That would have been the size and how
12 many diapers were in that specific packaging.

13 Q. And then there's a convenience pack,
14 which I imagine is something less than 48
15 diapers?

16 A. I don't think so. I think the medium
17 48 convenience pack was a larger pack so that
18 mothers could buy an expanded number of diapers
19 and would have to go to the store less often.

20 Q. Oh. What do you call those ones that
21 are -- carry only two or three diapers?

22 A. I'm not sure anymore. They would
23 probably be sample size or trial size.

24 Q. Okay. I see on this document that

1 much it contained.

2 Q. I mean, you could shape this as a
3 bucket and fill it up with fluids. Does that
4 have a bearing on it? I mean, because the
5 outer -- the back sheet is plastic, it pretty
6 much was impervious; is that right?

7 A. Yes.

8 Q. So in order to determine absorbency,
9 it doesn't have to avoid the cupping effect?

10 A. You -- you don't have to. Again, you
11 could add it slowly enough to see -- if you
12 wanted theoretical capacity or you talking about
13 in use, you may design the test differently. But
14 I used your question as theoretical capacity,
15 which you wouldn't add it so fast that it would
16 just flow right over. You'd add it slowly enough
17 to let it absorb and then add some more and add
18 some more.

19 Q. Okay. Do you have a lab or something
20 that does that kind of thing?

21 A. Yes.

22 Q. I see that Luvs Deluxe has the
23 patented night guard system. Do you see that?

24 A. Yes.

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1 the "Luvs Super Baby Pants VG" is the third
2 entry; is that right?

3 A. Yes, mm-hmm.

4 Q. And the first entry under that reads,
5 "Thinner diaper with better absorbency." Is
6 that right?

7 A. Yes.

8 Q. Is there a way to determine
9 absorbency?

10 A. Yes.

11 Q. Generally speaking, how do you do
12 that?

13 A. You would -- you could do it in
14 several ways, but you could load the diapers with
15 synthetic urine and see how much it contained in
16 weight, weigh it before and after it contained
17 urine.

18 Q. Before it starts -- what do you
19 essentially --

20 A. You'd take this diaper, you'd weigh
21 it to see how much it weighed. You would then
22 load it to where it would start to not to be able
23 to contain any more urine and then weigh it again
24 and the difference in weight would give you how

1 Q. What is the patented night guard
2 system?

3 A. It uses a lower density acquisition
4 zone to acquire liquids rapidly and then wick
5 them into the other zones in the core. It's
6 actually the Alemany and Burg patent.

7 Q. Did you have acquisition zones in the
8 core?

9 A. In -- in these particular Luvs
10 Deluxe, we did. I don't believe these Luvs G had
11 that feature.

12 Q. Can you tell us when this document,
13 Exhibit 10, was created?

14 A. Other than I'm -- I'm pretty sure it
15 was after 1987, no, I can't.

16 Q. Exhibit 11 you describe as a memo
17 giving historical data; is that right?

18 A. Yes.

19 Q. Do you know any of the people named
20 in this exhibit?

21 A. Yes.

22 Q. Who do you know?

23 A. Mr. Hirotsu, Mr. Glackin, Mr. Cannon,
24 Mr. Batsch, Mr. Alemany, Mr. Wiseman.

1 Q. How about the author?
 2 A. I do not know him.
 3 Q. Do you know of him?
 4 A. I do not.
 5 Q. Could you tell us who these others
 6 are?
 7 A. Mr. Hirotsu and Glackin were diaper
 8 designers in the nineties. They may have been
 9 even section heads or supervisors, R&D folks at
 10 that time. Mr. Cannon was the director of R&D
 11 for diapers at the time. Mr. Batsch had
 12 responsibility for the Pampers brand. Mr.
 13 Alemany, the Luvs brands and Mr. Wiseman, I
 14 believe, was keeper of the data.
 15 Q. What do you mean by, "keeper of the
 16 data"?
 17 A. He was responsible for tracking
 18 market share and -- and diapers and the features
 19 that would have put -- been put into those
 20 diapers.
 21 Q. Does anything in this Exhibit 11 tell
 22 you when the diaper, Exhibit 8, would have been
 23 introduced or was introduced?
 24 A. Well, it talks about at the bottom of

1 the second page of the exhibit, U.S. Diaper
 2 Category Historical Initiatives and Market
 3 Share. If you look down at the bottom, it has
 4 "Luvs" and it says "G Waistband" next to a
 5 diamond. And if you follow the dotted line up to
 6 there, it was May, June 1985, I believe, that
 7 that data point was referenced with Luvs being at
 8 about a eighteenth share of the market with
 9 the -- with the Luvs G waistband product.
 10 Q. Okay. So the diamond you're talking
 11 about is virtually the bottom left icon on the
 12 bottom of this page; is that right?
 13 A. That's correct.
 14 Q. So we follow that dotted line and we
 15 follow "MJ," which stands for May, June?
 16 A. Right.
 17 Q. And you read that as 1985?
 18 A. Yes.
 19 Q. Okay. And what does that dotted line
 20 tell you?
 21 A. It tells you that a Luvs G with the
 22 comfort waistband marketed in May, June of '85
 23 had a share, a market share of about 18 in the
 24 United States.

1 Q. Now, can you tell anything about the
 2 Sesame Street version that's marketed as Exhibit
 3 8?
 4 A. You can't, other than this is a Luvs
 5 G with a Sesame Street back sheet. So it was
 6 sometime in the time frame between G waistband
 7 and VG AGM being introduced that we would have
 8 had the Sesame Street back sheet on the diaper.
 9 But I can't point to a specific time, other than
 10 we know it was in '86 when this specific back
 11 sheet was put on.
 12 Q. The specific back sheet of Exhibit 8?
 13 A. Right.
 14 Q. Okay. Now, what does the diamond
 15 that says "Polybags," what does that mean?
 16 A. I believe at that point most diapers
 17 were marketed in cardboard cartons and Huggies
 18 came out with a bag that was made of a
 19 polyethylene film, rather than cardboard. So we
 20 would have called that polybag.
 21 Q. Okay. And the next one
 22 chronologically looks like it would be "Shaped."
 23 There's a diamond called "Shaped" --
 24 A. Yes.

1 Q. -- next to "QX"?
 2 A. Mm-hmm.
 3 Q. And what does "QX" stand for? What
 4 does "Shaped" mean?
 5 A. QX is a Pampers code, again one of
 6 these codes that we would have designated for
 7 Pampers and it means that the Pampers in this
 8 case went from the rectangular V-folded diaper to
 9 the hourglass shaped product in July, August
 10 of '85.
 11 Q. I'm really not that familiar with the
 12 folding of diapers. What do you mean by an
 13 E-fold?
 14 A. If I keep saying "E," it's V. I'm
 15 sorry, maybe I'm not --
 16 Q. Oh.
 17 A. -- being precise. I mean "V." You
 18 make two folds. One is you fold it back in, tack
 19 it down and then fold it back out so if you look
 20 at it from a cross-section, it would be a "V,"
 21 and we would mark it rectangular diapers with
 22 that type of fold in it.
 23 Q. Is that for packaging purposes or for
 24 use --

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1 A. No, it's for containment purposes,
 2 urine and --
 3 Q. Exudates?
 4 A. Yes.
 5 Q. So this V would be at the leg
 6 regions?
 7 A. It would be on the sides of the
 8 diaper, yes.
 9 Q. Would it be at the waistband also?
 10 A. No.
 11 Q. Okay. What is -- I'm sorry. You
 12 said "QX" meant want?
 13 A. It -- it was this shaped program.
 14 Q. Okay. What is "VX"?
 15 A. VX was the next diapers or Pampers
 16 code that designated that this AGM or absorbent
 17 gelling material was added into the absorbent
 18 core.
 19 Q. Okay. Now, I see there's something
 20 called "Dual Core Multistrand DFS." Can you
 21 illuminate us on that?
 22 A. Sure. That was a Pampers Y, and what
 23 we went to is two layers of core material, one
 24 being this AGM and wood pulp fluff mixture that

1 tissue underneath the top sheet.
 2 Q. Do you know anything about the "Soft
 3 Waistband" of Huggies?
 4 A. I know they introduced a waistband
 5 in '85, and I'm not sure what the difference
 6 between the soft waistband and the regular
 7 waistband. They -- they might have changed
 8 materials or something. I don't know for sure.
 9 Q. And do you know what the next diamond
 10 is in the Huggies line, "BLC"?
 11 A. Yes, that would be barrier leg cuffs.
 12 Q. Barrier --
 13 A. Leg cuffs.
 14 Q. Leg cuffs, what are they?
 15 A. Those are the stand-up cuffs you see
 16 in diapers of today inside of the leg elastic
 17 that help contain BM and urine.
 18 Q. When were -- well, were those
 19 introduced in the P&G products?
 20 A. Yes. Sometime -- we actually had a
 21 test market, I think, before the Huggies BLC hit
 22 the marketplace in 1989. And then they were put
 23 nationally onto Pampers in late '90. So it
 24 didn't show up on this trend chart.

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1 was in VX with another layer of straight fluff on
 2 top of that.
 3 The "multistrand" indicated that
 4 there were multiple elastics, and I believe we
 5 went to five strands of elastic in that product
 6 in the leg region.
 7 And "DFS" related to designated
 8 fastening surface, which was -- if you look at
 9 the G diaper, you hook the adhesive tape straight
 10 onto the poly. We put a strip across there so
 11 that you could fasten and unfasten the diaper
 12 without having to rip the poly.
 13 Q. Okay. I see. All right. Huggies is
 14 a product made by a competitor?
 15 A. Yes.
 16 Q. Do you know what "Supertrim" means
 17 there?
 18 A. That was probably their national code
 19 for what they called their diapers at that point.
 20 Q. Do you know what "Dry Touch" means or
 21 meant?
 22 A. Again, other than it was just a
 23 commercial code that would have been Huggies Dry
 24 Touch. It appeared to be some kind of blue

1 Q. I see. Do you know who this other
 2 name is on the page we've been looking at, R.J.
 3 Wight, W-I-G-H-T?
 4 A. Can you refer me specifically?
 5 Q. Bottom right corner, next to Mr.
 6 Stollenmeyer's name?
 7 MR. LANE: On the second page?
 8 MR. MANZO: Yeah, on the chart page.
 9 A. No, I do not know who that is.
 10 Q. Okay. Do any of the remaining pages
 11 of Exhibit 11 tell you anything about the Exhibit
 12 8?
 13 A. A little bit. Other than they show
 14 on the last page X slash G and X slash VG on the
 15 bottom of that table and, again, that would have
 16 related to Luvs G and Luvs VG and their market
 17 share data or quality image results, I'm sorry.
 18 Q. I'm sorry. The "G" stands for the
 19 1986 number and the VG?
 20 A. Luvs VG.
 21 Q. What is the X?
 22 A. I'm -- I'm -- was trying -- I would
 23 think that probably related to Pampers.
 24 Q. Okay. And now when I said Exhibit 8,

1 I hope you understood that I meant Defendant's
 2 Exhibit 8, not the Exhibit 8 marked here today?
 3 A. Yeah, I did understand that and since
 4 that's the Luvs G product, that's how I phrased
 5 my answer.
 6 Q. Thank you. Do you know Mr. Alemany?
 7 A. Yes.
 8 Q. What's his background?
 9 A. He's been a research scientist. I
 10 think he's a chemical engineer, if I remember
 11 right, that's been with P&G for 21-some years in
 12 various positions.
 13 Q. Do they involve diapers?
 14 A. Yes.
 15 MR. MANZO: Well, I propose that we
 16 break for lunch and when we come back, I'll
 17 probably be done. If there are any further
 18 questions --
 19 MR. LANE: Let's go off the record
 20 and discuss our time.
 21 THE VIDEOGRAPHER: We are off the
 22 record at 11:56.
 23 (Off the record.)
 24 THE VIDEOGRAPHER: We are on the

1 lawsuit concerns the word "soft." And I was
 2 wondering whether you at Procter and Gamble in
 3 the diaper group have any methodology for testing
 4 softness?
 5 MR. LANE: I'm going to object to
 6 that, Mr. Manzo. That's beyond the scope of the
 7 subpoena that you issued.
 8 Q. Okay. Mr. Miller, was any testing
 9 for softness done on Exhibit 8, Defendant's
 10 Exhibit 8, the diaper?
 11 A. Not that I'm aware of.
 12 Q. Can I see Exhibit 1, please, the
 13 subpoena? In terms of the general manufacturing
 14 techniques for producing disposable diapers, is
 15 there any testing for softness?
 16 MR. LANE: In what time frame? We're
 17 not going to talk about current manufacturing
 18 techniques.
 19 MR. MANZO: Let's say in the time
 20 frame of 1985. We'll say when you got there in
 21 1986 to 1990, okay?
 22 A. I was here in 1984, so -- I'm not
 23 aware of the manufacturing techniques related to
 24 testing softness.

1 record at 12:11.
 2 BY MR. MANZO:
 3 Q. Mr. Miller, I show you what's been
 4 marked as Exhibit 12. Can you identify what that
 5 is?
 6 A. It's a draft of the Alemany
 7 affidavit.
 8 Q. Who prepared that draft?
 9 A. Couple of different people.
 10 Q. Can you be more specific?
 11 A. I believe the written part was
 12 prepared by Kimberly-Clark -- or the typed part.
 13 And the handwritten part appears to be Mr. Lane's
 14 handwriting.
 15 Q. Is it your understanding that the
 16 typed part was received that way by Procter and
 17 Gamble?
 18 A. Yes.
 19 Q. And P&G was invited to fill in the
 20 blanks?
 21 A. Yes.
 22 Q. Is that how it worked?
 23 A. Yes.
 24 Q. Mr. Miller, one of the issues in this

1 Q. What about in the research and
 2 development group or otherwise concerning
 3 disposable diapers?
 4 A. I don't recall any specific testing.
 5 Q. Okay. Before today's deposition,
 6 have you met or conferred with any counsel for
 7 any of the defendants?
 8 A. Yes.
 9 Q. With whom?
 10 A. Mr. Gallo.
 11 Q. Barry Gallo?
 12 A. Yes.
 13 Q. Can you tell us when that occurred?
 14 A. Sometime this year in the last few
 15 months.
 16 Q. Was that a personal visit?
 17 A. No.
 18 Q. Telephone?
 19 A. Telephone conversation.
 20 Q. What was the substance of that call?
 21 A. Mr. Gallo was looking for an expert
 22 witness to testify concerning royalty rates.
 23 Q. Did you help him?
 24 A. Yes.

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1 Q. Did you give him some names of expert
2 witnesses?

3 A. No.

4 Q. How did you help him?

5 A. He wanted to use a former Procter and
6 Gamble employee and I was able to release that
7 employee.

8 Q. Who was that employee?

9 A. E. Kelly Linman.

10 Q. Is that male or female?

11 A. Male.

12 Q. Linman, L-I-N-M-A-N? /

13 A. Yes.

14 Q. Anything further in the conversation
15 or conversations with Mr. Gallo?

16 A. No.

17 Q. Any further conversation with any
18 counsel for defendants?

19 A. Well, I know there's a conversation
20 with Mr. Kappes, but I didn't -- wasn't involved
21 in that conversation.

22 Q. And that conversation was between
23 whom?

24 A. Mr. Lane and Mr. Kappes.

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1 Q. Any others?

2 A. No.

3 Q. No other communications relating to
4 this lawsuit that you're aware of?

5 A. That's correct.

6 Q. If this exhibit -- diaper of Exhibit
7 8 didn't have the Sesame Street characters on it,
8 how would you identify it as one version or
9 another?

10 A. Well, we could look at the features
11 on the diaper as to how many strands of elastic,
12 the tapes, what kind of core it had, and then go
13 back and look at whether or not it was a Luvs G
14 or a Luvs VG and then tie it back to this
15 particular time frame.

16 Q. With when did you first learn about
17 the present lawsuit?

18 A. I think it was reported in the press
19 that it had been -- been filed and I might have
20 seen it in like the IPO journal or something.
21 I'm not sure, but I did see a filing in public
22 records.

23 Q. I'm not aware of it having been in
24 the press personally.

1 A. Well, typically the IPO -- and I'm
2 thinking reports on all new patent lawsuits that
3 are filed because they keep records. So that
4 might have been where we saw it.

5 MR. MANZO: I see. Well, I want to
6 thank you for appearing here today and I have no
7 further questions and I tender the witness for
8 cross-examination.

9 MR. CASS: Before I begin, why don't
10 we just clear up whether the remaining exhibits
11 can be stipulated to be business records and I
12 think the ones that are still outstanding are
13 nine through 11.

14 MR. MANZO: I -- I want to think
15 about that and look at the rules. I think
16 there's something in the Federal Rules about
17 compilations, and Exhibit 9 seems to be a
18 compilation or a summary of evidence. So if you
19 don't mind, I'd like to reserve my judgment on
20 those three exhibits.

21 MR. CASS: Okay.

22 MR. MANZO: But I've stipulated as to
23 the others.

24 MR. CASS: Can you hand me those

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1 diaper samples?

2 MR. MANZO: Certainly. This one came
3 out of this bag.

4 MR. CASS: Okay.

5 MR. MANZO: That's yours. Is this
6 from that bag?

7 MR. CASS: Yes.

8 EXAMINATION

9 BY MR. CASS:

10 Q. Would you please state your name?

11 A. Steven W. Miller.

12 MR. MANZO: Is this cross-examination
13 or are you now taking a deposition?

14 MR. CASS: Well, I think it's
15 cross-examination.

16 MR. MANZO: Okay.

17 BY MR. CASS:

18 Q. Let me start again. Would you state
19 your name?

20 A. Steven W. Miller.

21 Q. Where do you work?

22 A. The Procter and Gamble Company.

23 Q. What is your business address there?

24 A. 6090 Center Hill Road, Cincinnati,

1 Ohio 45224.

2 Q. What do you do at Procter and Gamble?

3 A. I'm the chief patent counsel for the
4 company. My official title is Vice President and
5 General Counsel - Patents, P&G Worldwide.

6 Q. How long have you worked at Procter
7 and Gamble?

8 A. 16 years.

9 Q. Is it correct that you did some
10 homework before you came here today, that you
11 gathered information?

12 A. Yes.

13 Q. Are you testifying here as a
14 representative of your employer, Procter and
15 Gamble?

16 A. Yes.

17 Q. Let me hand you a diaper that has
18 been marked as Defendant's Exhibit 8. Have you
19 ever seen a diaper like this before?

20 A. Yes.

21 Q. Can you identify this diaper?

22 A. Yes. This is a Luvs diaper that was
23 manufactured by Procter and Gamble. It has --
24 it's of the Luvs G variety, which would be an

1 A. We can only give an approximation.

2 We can't give an exact date. I believe, based on
3 the records, it would be about February of 1986.

4 Q. How do you know that that is the
5 correct date?

6 A. We have packaging that identifies
7 that product as being ready to be sold in 1986,
8 in February.

9 Q. I'd like to at this time mark
10 Exhibits 12 through -- 13 through 15. Mr.
11 Miller, you mentioned some documents. Do you --
12 have those documents been marked today at this
13 deposition?

14 A. Yes. These are the Exhibits 13
15 through 15.

16 Q. And could you identify Exhibits 13
17 through 15 for me?

18 A. Yes. These are copies of the Luvs
19 packaging, Luvs G more specifically, that came
20 out of our archives. P&G maintains an archive of
21 packaging and -- and products that it sells
22 within the marketplace. And those are then
23 either then microfilmed or kept in a certain area
24 and dated.

1 internal code that we used. And this has a
2 specific type of back sheet with Sesame Street
3 characters on it.

4 Q. How can you tell that it is a Luvs G
5 diaper?

6 A. From the way the diaper is
7 constructed, Luvs G had a fairly thick absorbent
8 core that was hourglass shaped. It has two
9 strands of elastic in the waist, tape tabs and it
10 has what we called a comfort waistband. And this
11 product has all of those features.

12 Q. Can you give me a date by which you
13 are absolutely certain that the diaper you
14 identified were on sale in the United States?

15 A. Yes.

16 Q. And what would that date be?

17 A. In May of 1986, we began producing
18 those in 1986, and then switched over to a
19 different format with a Luvs VG, we called it, in
20 the fall of 1986. So this was on -- in the
21 marketplace for that limited amount of time.

22 Q. Could you identify the date on which
23 products identical to this were first sold in the
24 United States?

1 And you can see at the bottom it
2 says, "Working Drawing date 2/27/86." So this
3 would have been this particular package blank and
4 it includes the Sesame Street characters, which
5 would have been this type of Luvs diaper.

6 Q. Does that date tell you anything
7 about when the product was first sold?

8 A. It tells us that the archives
9 certainly received this packaging in that time
10 frame, which would have corresponded to when we
11 first took the product commercial because we
12 don't keep samples, other than are commercially
13 sold.

14 Q. Now, you mentioned that this diaper
15 had Sesame Street characters. Was there also a
16 Luvs G diaper that did not have the Sesame Street
17 artwork?

18 A. Yes.

19 Q. Do you know, can you give me a date
20 by which you're absolutely certain that those
21 diapers were on sale in the United States?

22 A. Yes, I can.

23 Q. And what would that date be?

24 A. We first sold these diapers in the

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1 test market in Cleveland in September of 1984,
2 and then caused a national expansion of the Luvs
3 G diaper in May of 1985.

4 Q. Now, how are you absolutely certain
5 of those dates?

6 A. We went back and looked at the
7 historical records and -- and got these documents
8 that were earlier marked as I believe Exhibits 9
9 and 10, which were compilations of -- of dates
10 that we believe are accurate as to when these
11 various marketings would have taken place.

12 Q. Could you point out for me on Exhibit
13 9 which of the items that confirm that?

14 A. Yes. If you look at Exhibit 9, the
15 fourth entry says September 1984 Luvs G test
16 market in Cleveland, and Cleveland's misspelled
17 there. And then if you look at about one, two,
18 three, four, four down from there, May 1985
19 national expansion of Luvs G in the U.S.

20 Q. Now, the entry you just referred to
21 in September of 1984, it says test marketed in
22 Cleveland. What does that entail?

23 A. That would have been shipping the
24 Luvs G product into just the Cleveland sales area

1 it says "LG" in parenthesis. What does that
2 refer to?

3 A. Yeah. I believe what was meant on
4 this document was Luvs G. It's a different code
5 instead of G, but I also noted on Luvs Deluxe,
6 that at the bottom, that says LS and the code was
7 Luvs S. So I believe that someone inserted the L
8 to do denote it as Luvs.

9 Q. So the Luvs, the "LG" denotes Luvs G
10 diapers?

11 A. Yes.

12 Q. Have you looked at any other
13 documents to confirm your understanding?

14 A. Yes. If you look at Exhibit 11, that
15 confirms some of the data as well.

16 Q. What on Exhibit 11 exactly?

17 A. If you look at the second page, we
18 have a U.S. diaper category market share chart.
19 And at the bottom, there's a line concerning
20 Luvs. In the first entry is "G," and then it has
21 a diamond and then "Waistband." So this would
22 have been the Luvs G with the waistband that
23 we've talked about. And if you follow that line
24 up, it shows May, June 1985, which corresponds to

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1 to test how consumers react and would buy that
2 particular product. We wouldn't have shipped it
3 to the rest of the country, just to that sales
4 district.

5 Q. And how does that differ from
6 national expansion?

7 A. Well, national expansion, we would
8 have sold the diapers in all of our sales
9 districts in the U.S., so that the product would
10 have been available to everyone in the United
11 States.

12 Q. Are there any other documents that
13 confirm your understanding?

14 A. If you look at, then, Exhibit 10, we
15 talk about in there, there's a heading, "Luvs
16 Baby Pants LG." If you look at its description,
17 it says, "Hourglass shape with double row of
18 gathers around legs and elastic waist," which
19 would, again, denote the Luvs G product. And we
20 have 1984 introduced into test market, which
21 confirms the previous document. And "5/85
22 Expanded nationally," which again confirms the
23 previous document.

24 Q. I notice on that entry on Exhibit 10,

1 our national expansion date of that product and
2 then gives a share for Luvs at that time period.

3 Q. Mr. Miller, did you bring any diapers
4 with you today?

5 A. Yes.

6 Q. I'm going to mark -- and I'm just
7 going to mark the bag. I'd like these as 16 and
8 17 and 18. Can you tell me what Exhibits 16, 17
9 and 18 are?

10 A. Sure. Exhibit 16 is a Luvs VG
11 diaper. And let me test for the thickness. Yes,
12 it's a Luvs G diaper that has the same features
13 as we talked earlier with the Sesame Street
14 product, except that it has a white back sheet on
15 it. And then it still has what we call the
16 comfort waistband on it. And then there's a copy
17 of the packaging of this product. And it's Luvs,
18 and you can see up at the top we have a denoter,
19 "New Comfort Waistband."

20 So this would have denoted that this
21 was the new product with the comfort waistband.
22 And, again, on the back we have that this came
23 from a box of large diapers and it says, "New
24 Luvs Deluxe Comfort Waistband."

1 So this would have been the
2 packaging. And I note that's marked on here we
3 have Luvs large 2924 DAD on this bag in
4 handwriting, which corresponds to the diaper 2924
5 DAD also marked. So this product was taken from
6 this package, is my understanding.

7 The next exhibit is also a Luvs G
8 diaper, I believe, and I'll inspect it to make
9 sure. Yes, it is. And it, again, has the
10 waistband feature and a white back sheet. And
11 it's marked 0436 DEA. And then there's a copy of
12 the packaging that goes with it, and it also has
13 the 0436 DEA. And at the top, it's a copy of the
14 package, and it says "New Revolutionary Comfort
15 Waistband." And this was a medium superabsorbent
16 diaper and it has similar markings for the rest
17 of the package.

18 And then the final diaper, I believe,
19 is a Luvs VG, which denotes a thinner diaper that
20 included superabsorbent in the core. In other
21 words, there were particles in the core that made
22 it thinner. And I can tell that this is thinner
23 than some of the other products. It has similar
24 features, though, with the leg elastics and the

1 are the same for most of the features, the
2 waistband, the leg bands, the cores.
3 Q. Are there any differences you can see
4 between the Luvs G diapers marked as Exhibit 16
5 and 17 and Defendant's Exhibit 8?

6 A. The only difference is in the Sesame
7 Street printed back sheet that's on this exhibit
8 versus just the plain white back sheet on these
9 diapers.

10 Q. Now, let me just ask you a few quick
11 questions as to Exhibits 9, 10 and 11. Let me
12 show you Exhibit 9 first.

13 A. I've got it.

14 Q. Could you briefly identify this
15 document?

16 A. Yes. This is a part of a chronology
17 that was created by Procter and Gamble showing
18 the roll outs of various commercially available
19 diapers in the time frame of '84 to '88.

20 Q. Was this record made by a person with
21 knowledge of the events or from information
22 transmitted by a person with knowledge of the
23 events?

24 A. Yes.

1 waistband. And it's -- has a marking of 2206
2 DEB, which corresponds to, then, the packaging
3 copy that we have, 2206 DEB. And it talks about
4 new super baby pants, maxi absorbent, thin, trim
5 fit, which would denote the superabsorbent in the
6 product to make it thinner. So I believe that
7 this is a Luvs VG diaper.

8 Q. The Luvs G diaper as you've
9 identified as Exhibits 16 and 17, are those the
10 same as the diapers that you mentioned had been
11 first introduced -- sold nationally in May of
12 1985?

13 A. Yes.

14 Q. I'd like you to -- are there any
15 differences between the Luvs G diaper shown --
16 let me step back and ask you a question before
17 this.

18 Are there any differences between the
19 diapers, the Luvs G diapers marked as Exhibits 16
20 and 17?

21 A. I -- I haven't gone in and inspected
22 them. There may be some construction adhesive
23 changes or various materials may have changed.
24 But my understanding is that those constructions

1 Q. Was this record kept in the ordinary
2 course of a regularly conducted business activity
3 of Procter and Gamble?

4 A. Yes.

5 Q. Was it the regular practice of
6 Procter and Gamble to make this record?

7 A. Yes.

8 Q. Let me turn to Exhibit 10.

9 A. Mm-hmm.

10 Q. Let me go back to Exhibit 9 for a
11 second. Where did -- how were you able to find
12 this document?

13 A. I believe someone at Procter and
14 Gamble -- I'm not sure whose files it came out of
15 was -- had a copy of this document in their
16 possession and when we asked for historical
17 records related to this time frame, it was
18 produced to us.

19 Q. Let me move to Exhibit 10.

20 A. Okay.

21 Q. If you could just identify that for
22 me quickly?

23 A. This is a history of -- of Luvs
24 diapers beginning from its first introduction

1 in '76 up until the 1987 time frame.

2 Q. And was this record made by a person
3 with knowledge of the events or from information
4 transmitted by a person with knowledge of the
5 events?

6 A. Yes.

7 Q. Was this record kept in the ordinary
8 course of regularly conducted business with
9 Procter and Gamble?

10 A. I don't believe so. I think this was
11 a specially created document to document Luvs
12 history for this time period that we had kept as
13 a record. I -- I don't know that this was
14 routinely updated.

15 Q. Was this the kind of records that
16 from time to time Procter and Gamble would make?

17 A. Oh, definitely, yeah. I mean, we
18 would create these kind of records to show what
19 had happened in the past so that we'd know when
20 roll outs and expansions were made.

21 Q. Let me turn to Exhibit 11 --

22 A. Okay.

23 Q. -- and I'm just going to ask you
24 about -- well, let me ask you to summarize

1 Procter and Gamble to make this record?

2 A. Not regular. This was a specially
3 made document for this particular purpose, but we
4 kept it as a historical record because it tended
5 to show various features of our diapers.

6 Q. Would Procter and Gamble make other
7 similar types of records from time to time?

8 A. Yes.

9 Q. Were any of the documents in Exhibits
10 9 through 11 created for the purposes of
11 litigation?

12 A. No.

13 Q. Were all of them created as part of
14 Procter and Gamble's business activities?

15 A. Yes.

16 MR. MANZO: Let me just go off the
17 record for a second.

18 THE VIDEOGRAPHER: We are off the
19 record at 12:42.

20 (Off the record.)

21 THE VIDEOGRAPHER: We are on the
22 record at 12:42.

23 MR. CASS: I have nothing further.

24 MR. SMITH: No questions.

1 quickly for me what this document is and then
2 specifically refer to the second page?

3 A. This is a memo to two of our diaper
4 designers concerning historical data for the
5 market share of a couple of Procter and Gamble
6 products versus Huggies products. And if you
7 look at page 2, there's a chart of market shares
8 at the top. And then at the bottom, there's a
9 key -- a time line that goes along with what
10 features were rolled out by various of the
11 products, Pampers, Huggies and Luvs. And then
12 you can tie back to how their market share was
13 doing.

14 Q. Was this document -- and I'll refer
15 to the chart on the second page -- made by a
16 person of knowledge of the events or from
17 information transmitted to that person with
18 knowledge of the events?

19 A. Yes.

20 Q. Was this record kept in the ordinary
21 course of a regularly conducted business activity
22 of Procter and Gamble?

23 A. Yes.

24 Q. Was it the regular practice of

1 MR. MCCOY: No questions.

2 MR. MANZO: I have some re-direct.

3 EXAMINATION

4 BY MR. MANZO:

5 Q. Mr. Miller, where's the rest of the
6 document from which Exhibit 9 came?

7 A. It hasn't been produced. I can
8 assume that it's back at our offices.

9 Q. Did it appear to you that Exhibit 9
10 is page 4 of some other document?

11 A. Yes.

12 Q. Do you know what's on page 3?

13 A. It has the earlier time frame as to
14 when we would have test marketed or introduced
15 other diaper products.

16 Q. Have you seen it before?

17 A. Yes.

18 Q. Who's the custodian of the document?

19 A. I'm not sure. We'd have to check to
20 let you know.

21 Q. Are you the custodian of the
22 individual exhibits that have been marked today?

23 A. I am not.

24 MR. MANZO: Nothing further.

1 MR. CASS: I have nothing further.
2 MR. MCCOY: Nothing further.
3 THE VIDEOGRAPHER: This concludes the
4 deposition at 12:43.

5
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7 _____
8 Steven W. Miller
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1 or in any way interested in the within action,
2 and that I was at the time of taking said
3 deposition a Notary Public in and for the State
4 of Ohio.

5 IN WITNESS WHEREOF, I have hereunto
6 set my hand and notarial seal at Cincinnati,
7 Ohio, this day of
8 2000.

9
10
11 Susan M. Barhorst, Notary Public
12 in and for the State of Ohio.
13 My commission expires
14 February 18, 2004
15
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17
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24

1 CERTIFICATE
2

3 STATE OF OHIO :

4 : SS

5 COUNTY OF HAMILTON :
6

7 I, Susan M. Barhorst, a Notary Public
8 in and for the State of Ohio, duly commissioned
9 and qualified, do hereby certify that prior to
10 the giving of this deposition the within-named
11 STEVEN W. MILLER was by me first duly sworn to
12 testify the truth, the whole truth, and nothing
13 but the truth; that the foregoing pages
14 constitute a true, correct, and complete
15 transcript of the testimony of said deponent,
16 which was recorded in stenotypy by me, and on the
17 30th day of September 2000 was submitted to
18 counsel for deponent's signature.

19 I further certify the within
20 deposition was duly taken before me at the time
21 and place stated, pursuant to the Federal Rules
22 of Civil Procedure; that I am not counsel,
23 attorney, relative or employee of any of the
24 parties hereto, or their counsel, or financially

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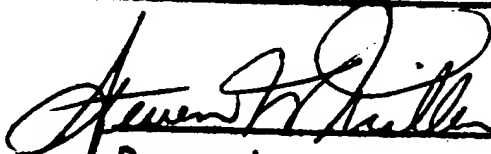
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CORRECTIONS/CHANGES TO DEPOSITION TRANSCRIPT:

PAGE	LINE	CORRECTION/CHANGE
12	15	V-folded → Z-folded
15	7	Saby → Sabee
42	18	head shrinkage → heat shrinkable
54	8	V-folded → Z-folded
60	6	Burg → Berg
64	8	V-folded → Z-folded
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64	17	V → Z
64	20	V → Z
106	7	designated → dedicated
72	11	Gallo → Galob
72	21	Gallo → Galob
71		

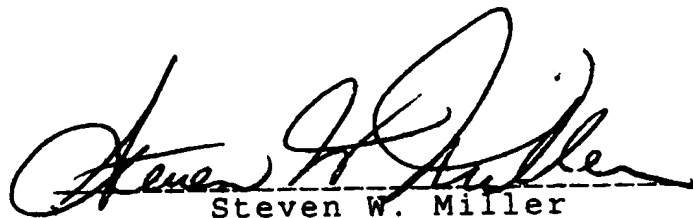

 10/24/00
 Deponent Date

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1 MR. CASS: I have nothing further.

2 MR. MCCOY: Nothing further.

3 THE VIDEOGRAPHER: This concludes the
4 deposition at 12:43.

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Steven W. Miller

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C E R T I F I C A T E

STATE OF OHIO :
: SS
COUNTY OF HAMILTON :

I, Susan M. Barhorst, a Notary Public
in and for the State of Ohio, duly commissioned
and qualified, do hereby certify that prior to
the giving of this deposition the within-named
STEVEN W. MILLER was by me first duly sworn to
testify the truth, the whole truth, and nothing
but the truth; that the foregoing pages
constitute a true, correct, and complete
transcript of the testimony of said deponent,
which was recorded in stenotypy by me, and on the
30th day of September 2000 was submitted to
counsel for deponent's signature.

I further certify the within
deposition was duly taken before me at the time
and place stated, pursuant to the Federal Rules
of Civil Procedure; that I am not counsel,
attorney, relative or employee of any of the
parties hereto, or their counsel, or financially

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1 or in any way interested in the within action,
2 and that I was at the time of taking said
3 deposition a Notary Public in and for the State
4 of Ohio.

5 IN WITNESS WHEREOF, I have hereunto
6 set my hand and notarial seal at Cincinnati,
7 Ohio, this 6th day of November
8 2000.

9
10
11 Susan M. Barhorst
12 Susan M. Barhorst, Notary Public
13 in and for the State of Ohio.
14 My commission expires
15 February 18, 2004
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